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NO.

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Petitioners,

v.

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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54 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals misapplied *Hensley v. Eckerhart* when it concluded that Respondents are prevailing parties entitled to an award of attorney's fees.

2. Assuming *arguendo* that Respondents are prevailing parties, what is the proper measure of attorney's fees to be awarded in civil rights actions where substantial monetary damages alone are sought, and insignificant monetary damages are ultimately awarded.

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OPINIONS BELOW

The opinion of the three-judge panel of the United States Court of Appeals for the Tenth Circuit filed on July 10, 1985 is reported as *Nephew v. City of Aurora,* 766 F.2d 1464 (10th Cir. 1985). The order of the Court of Appeals for the Tenth Circuit granting Respondents' petition for rehearing and suggestion for rehearing en banc is not reported. The opinion of the United States Court of Appeals for the Tenth Circuit on rehearing en banc filed on October 19, 1987 is reported as *Nephew v. City of Aurora,* 830 F.2d 1547 (10th Cir. 1987) (en banc).

JURISDICTION

The three-judge panel of the Tenth Circuit entered its judgment on July 10, 1985. On March 4, 1986, the Tenth Circuit Court of Appeals granted Respondents' petition for rehearing and suggestion for rehearing en banc, vacated the opinion of July 10, 1985, and stayed briefing until the then-pending decision of the United States Supreme Court in *City of Riverside v. Rivera*, 54 U.S.L.W. 4845 (U.S. June 27, 1986) (No. 85-224), was rendered. On October 19, 1987, the Tenth Circuit Court of Appeals en banc entered its judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable

remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

A. The Factual Background of This Case.

The issues presented to the jury in this case stem from a late evening noise complaint received by the Aurora Police Department, which dispatched two Aurora police officers to respond to the call. Respondents alleged that the two white Aurora police officers who responded to the noise complaint, entered the residence of Respondent Perkins and there, motivated by racial discrimination, assaulted, battered, bruised and falsely arrested Respondents. The facts were in sharp dispute. The police officers contended that they were subjected to assault and battery at the hands of Respondents.

B. The Proceedings in the District Court.

Respondents filed suit against the two Aurora police officers and the City of Aurora for allegedly infringing upon their constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, and 1985 (1982). Respondents invoked the jurisdiction of the district court pursuant to 42 U.S.C. § 1983. Respondents alleged that they

had been assaulted, battered and subjected to false arrest by the police officers pursuant to a custom or policy of the City of Aurora to discriminate against blacks.[1] Injunctive and declaratory relief and damages were sought against the City, its Mayor, and its City Council. At the close of the Respondents' case, however, the City, Mayor and City Council were removed from the case when the district court granted their motion for a directed verdict. Significantly, the district court also eliminated injunctive and declaratory relief from Respondents' case because Respondents made no attempt in their case in chief to prove the requisite unconstitutional custom or policy.

The case then proceeded to jury determination under 42 U.S.C. § 1983 based solely on Respondents' damages liability claim. In essence, the only real relief ever sought by Respondents in this case was compensatory and punitive damages in the amount of two million dollars against the two individual police officers. The jury found in favor of Respondents Fulton and Perkins and against Respondents Nephew and Neloms. The jury awarded one dollar ($1.00) each to Respondents Fulton and Perkins and no punitive damages, despite the fact that Respondents' counsel implored the jury during closing argument to award significant monetary damages.

Respondents Fulton and Perkins then moved for attorney's fees under 42 U.S.C. § 1988. The district court apparently reduced the amount sought by a proportion of the time spent on the related state case,[2] and then reduced that amount further on

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[1]Respondents' Complaint was originally filed both individually and on behalf of all persons similarly situated. Prior to trial, the district court dismissed the class action allegations. Respondents filed an Amended Complaint eliminating the class action aspect of the case.

[2]The police officers initially filed suit against Respondents in state court and Respondents counterclaimed. After trial in the federal case, the state action was dismissed by stipulation.

the basis that only two of the four Respondents prevailed.[3] Thereupon the district court awarded attorney's fees in the amount of $12,500.00. The district court refused to reduce the attorney's fee award on the grounds that Respondents Fulton and Perkins had each received only one dollar ($1.00).

C. The Court of Appeals' Decision.

Petitioners appealed solely on the issue of the award of $12,500.00 attorney's fees. A divided three-judge panel of the Court of Appeals for the Tenth Circuit[4] held that when a plaintiff seeks substantial monetary damages but is awarded only one dollar ($1.00) the award must be discounted to compensate for plaintiffs' very limited success. (App. C, 12a).

Upon Respondents' petition for rehearing, the Court of Appeals for the Tenth Circuit decided to reconsider the issue en banc in light of the then-pending decision of this Court in *City of Riverside v. Rivera.*

The Court of Appeals for the Tenth Circuit en banc, by a vote of five to three, ruled that the district court's award of attorney's fees in the amount of $12,500.00 was neither clearly erroneous nor an abuse of its discretion, despite the fact that the two "prevailing" Respondents were each awarded only one dollar ($1.00).

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[3]The district court's findings of fact are so brief and conclusionary that it is impossible to determine whether the court used a "lodestar" figure in computing the award of attorney's fees. Nor is it possible to determine the amount of the reductions made by the court for the portion of time spent on the related state case or the reduction made on the basis that only two of the four Respondents "prevailed". (*See* App. A, 1a-7a).

[4]Judge Doyle, who participated in the three-judge panel's decision, died prior to the Court of Appeals' en banc consideration of this case.

REASONS FOR GRANTING THE WRIT

This petition presents narrow, recurring and vitally important questions concerning the award of attorney's fees in civil rights actions where only monetary damages are sought, and insignificant monetary damages are ultimately awarded.

I. The Standard Applied By The Court of Appeals To Determine Whether Respondents Were Prevailing Parties Entitled To An Award Of Attorney's Fees Cannot Be Reconciled With *Hensley* Or With Other Circuits' Interpretation Of *Hensley*.

In *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), the Court cited *Nadeau v. Helgemoe*, 581 F.2d 275, 278–279 (1st Cir. 1978), for the formulation of the test used to determine whether a party has prevailed for the purposes of the award of attorney's fees:

> [P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation *which achieves some of the benefit the parties sought in bringing suit.* (Emphasis added).

In a post-*Hensley* decision, the Sixth Circuit adopted an even more restrictive test for "prevailing party" which requires that the plaintiff prevail on "the central issue." *Kentucky Association for Retarded Citizens, Inc. v. Conn*, 718 F.2d 182, 186 (6th Cir. 1983).

Furthermore, in *Hewitt v. Helms*, 55 U.S.L.W. 4907 (U.S. June 19, 1987) (No. 85-1630), this Court continued its exploration of the parameters of the term "prevailing party" in the context of an attorney's fee award under 42 U.S.C. § 1988. In that case, this Court held that a prisoner who obtained no relief for claimed violations of constitutional rights was not a "prevailing party" for purposes of an attorney's fee award under 42 U.S.C. § 1988, despite the fact that he received a favorable judicial statement of law during the course of the litigation and that changes were made in prison procedures after his release.

Returning to the test established in *Nadeau* and adopted by the Court in *Hensley*, Respondents are prevailing parties " . . . if they succeed on any significant issue in litigation *which achieves some of the benefits the parties sought in bringing suit.*" 461 U.S. at 433 (Emphasis added). Respondents met the first part of the test in that they succeeded on a significant issue; however, they failed with respect to the second part of the test because they did not obtain the benefits which Respondents sought in bringing the suit —significant monetary damages, either compensatory or punitive.

In the context of the present case, the Court of Appeals found Respondents were successful but failed to consider properly what benefits were achieved. The Court of Appeals misconstrued the thrust of Respondents' case stating "[t]he amount of monetary damages in the present case was less important than the judgment against the police officers' conduct."[5] (App. D, 26a).

The one dollar ($1.00) verdict did not serve as a catalyst for change to benefit Respondents, much less others similarly situated. In fact, Respondents' injunctive and declaratory relief claims against the City, its Mayor, and its City Council did not survive a motion for directed verdict because Respondents made no attempt to prove the existence of an unconstitutional custom or policy. Rather, Respondents attempted to prove only damages for physical injuries which they allegedly received during the incident.

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[5]There is simply no basis for the Court of Appeals' interpretation of the significance of the jury's verdict. No restraining orders or injunctions were issued against any of the Petitioners, and they were not compelled to, nor did they, change any of their practices or policies as a result of this lawsuit. This lawsuit was not aimed at creating new law; rather, it was aimed solely at obtaining significant monetary damages for the Respondents against the two individual police officers. That goal was not achieved. One must question what is the "normal reaction" to this verdict by Petitioners, other police officers, the media, and the community as a whole.

As Senior Circuit Judge Barrett stated in the dissenting opinion (App. D, 28a):

> The majority opinion states that 'the amount of monetary damages in the present case was less important than the judgment against the officers' conduct' in vindication of plaintiffs' civil rights and 'its message to the police department.' Slip Opinion, p. 9 [App. D, 26a]. What civil rights of the plaintiffs were violated? What sort of vindication is indicated by virtue of a $1.00 award? It cannot be seriously contended that the jury believed that these plaintiffs were subjected to assault and battery, false arrest and outrageous conduct. What, then, is the 'message' the trial court and this court are conveying to the City of Aurora police officers? The question defies a logical, reasonable answer. It was *not* answered by the district court, except in general, undefined platitudes. If the police officers did wrong, they are left groping for guidance and direction. (Emphasis in original).

If this had been a case where injunctive relief was awarded or new law created, Petitioners would not be filing this petition. However, in a case where plaintiffs *sole* purpose is to obtain substantial monetary damages for alleged personal injuries, an award of one dollar ($1.00) reflects only a "moral victory". Such a "moral victory" is of insufficient magnitude to warrant an award of attorney's fees under 42 U.S.C. § 1988. *Huntley v. Community School Board of Brooklyn*, 579 F.2d 738, 742 (2nd Cir. 1978).

The Tenth Circuit's holding markedly departs from the holding in *Hensley* and the holdings of other Circuits. This Court's review is necessary to resolve this conflict and to define more precisely the parameters within which a plaintiff may be deemed a "prevailing party" entitled to an award of attorney's fees under 42 U.S.C. § 1988.

II. Assuming *Arguendo* That Respondents Are Prevailing Parties, The Award Of Attorney's Fees Must Be Discounted To Compensate For Their Very Limited Success.

Following the jury's award of two dollars ($2.00) to Respondents Fulton and Perkins, Respondents' counsel was awarded attorney's fees in the amount of $12,500.00. While this award may not be disproportionate to the number of hours actually expended by counsel, this award is grossly disproportionate to the degree of success achieved by Respondents.

Upon Respondents' petition for rehearing, the Court of Appeals decided to stay briefing and to reconsider this case en banc after this Court announced its decision in *City of Riverside v. Rivera*. The Court of Appeals, however, misapplied *Rivera* in holding that the district court did not abuse its discretion when it failed to reduce the attorney's fee award because the two prevailing Respondents each were awarded only one dollar ($1.00).

In *Rivera*, this Court, in a plurality opinion, declined to adopt a strict proportionality rule for the award of attorney's fees under 42 U.S.C. § 1988. More importantly, however, this Court reaffirmed that *Hensley* indicates the factors to be considered in awarding attorney's fees under 42 U.S.C. § 1988.[6] In *Hensley*, this Court explicitly stated that one "important factor" in determining the "reasonableness" of a fee award is the "results obtained". 461 U.S. at 434. This Court further explained (*id.*):

> This factor is particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief.

[6]The 12 factors are: (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the

(Footnote continued on next page)

In his concurring opinion in *Rivera*, Justice Powell addressed the issue of the proper measure of attorney's fees to be awarded plaintiffs under 42 U.S.C. § 1988 where award of *private damages* is the purpose of a civil rights litigation (54 U.S.L.W. at 4851 (Powell, J., concurring)):

> . . . The facts and circumstances of litigation are infinitely variable. Under *Hensley*, of course, 'the most critical factor [in the final determination of fee awards] is the degree of success obtained.' 461 U.S., at 436. *Where recovery of private damages is the purpose of a civil rights litigation, a district court, in fixing fees, is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.* (Emphasis added).

Only Respondents' claims for compensatory and punitive damages in the amount of two million dollars reached the jury. Because only Respondents' claims for private damages reached the jury, this case should properly be considered one for private damages.[7]

In his concurring opinion in *Rivera*, Justice Powell further observed that "[i]t probably will be the rare case in which an award

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(Footnote continued from previous page)
experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. These factors were first articulated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The Supreme Court in *Hensley* noted that "many of these factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." 461 U.S. at 434 n. 9.

[7]This case is clearly distinguishable from *Rivera* in that here there was no benefit to the public interest by an award of two dollars ($2.00) private damages. In contrast, the jury in *Rivera* returned 37 individual verdicts in favor of the plaintiffs and against the City of Riverside and five police officers, and plaintiffs were awarded $33,350.00 in compensatory *and* punitive damages. Further, the district court in *Rivera* observed that even though the plaintiffs ultimately dropped their request for injunctive relief, the defendants' misconduct clearly would have warranted an injunction. *See* 54 U.S.L.W. at 4846, 4848 n. 7.

of *private damages* can be said to benefit the public interest to an extent that would justify the disproportionality between damages and fees reflected in this case." 54 U.S.L.W. at 4852 n. 3 (Powell, J., concurring) (Emphasis in original). In *Rivera,* the attorney's fees award was roughly seven times the compensatory and punitive damages award. In this case, the attorney's fee award is 6,225 times greater than the award of damages.

In addition, in making its $12,500.00 attorney's fee award in this case, the district court erroneously relied upon the following dicta in *Ramos v. Lamm,* 713 F. 2d 546, 557 (10th Cir. 1983):

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice.

This dicta, which was also the cornerstone of Judge McKay's dissenting opinion in *Nephew v. City of Aurora* (App. C, 13a-17a), clearly conflicts with the express language of *Hensley* and *Rivera.* As Senior Circuit Judge Barrett noted in the dissenting opinion (App. D, 33a):

> Significantly, Judge McKay does not cite to *Ramos v. Lamm* in his opinion for the en banc court, even though it was the basis for his dissent from the original panel opinion in this case and even though the district court stated that it was guided and governed by *Ramos v. Lamm.* (R., Vol. II, pp. 2, 8, 9).

In this case, Respondents success was so minimal that even the "reduced" attorney's fee award of $12,500.00 is unconscionable. While it is arguable that Respondents Fulton and Perkins are technically "prevailing parties", the extremely limited success they achieved bears no reasonable relationship to the amount of attorney's fees awarded and demonstrates conclusively that the district court not only failed to give "primary consideration" to the "results obtained" factor set forth in *Hensley,* but refused to

give this crucial factor any consideration whatsoever. Thus, the Tenth Circuit's opinion conflicts with this Court's holdings in *Hensley* and *Rivera*. This Court's review is necessary to resolve this conflict.

III. The District Court's Ruling Is So Vague That Attorney's Fees Cannot Be Assessed On The Basis Of That Ruling.

In *Rivera*, on appeal on the issue of attorney's fees alone, this Court vacated judgment and remanded the case for reconsideration in light of the *Hensley* decision. After additional hearings, the district court, on remand, made extensive findings of fact and conclusions of law and again concluded that plaintiffs were entitled to attorney's fees, based upon the same hours and rates. On appeal, this Court affirmed, expressing the view that the district court had correctly applied the factors announced in *Hensley* in calculating the award.

In this case, the Court of Appeals' decision violates the *Rivera* requirement that the district court's findings be sufficiently precise to assure that the court correctly applied the factors announced in *Hensley*. While the Court of Appeals here failed to address the issue except in conclusory terms (App. D, 25a), it is obvious that the district court's findings, which the Court of Appeals affirmed, are not sufficiently precise to allow an appellate court to determine how they were calculated. By way of illustration, it is not possible to determine from the court's findings the amount of the reduction which was made by the district court for the portion of time spent on the related state case, or the reduction made on the basis that only two of the four Respondents prevailed.

No matter how much discretion the district court retains to award attorney's fees, the parties are entitled to fair and reasonable consideration of the issue. The district court is required to

articulate its consideration of the factors announced in *Hensley* to ensure the possibility of meaningful appellate review. For this additional reason, the decision below conflicts with *Rivera*.

IV. The Court Of Appeals' Decision Will Undermine The Purposes Underlying 42 U.S.C. § 1988.

The twin purposes of 42 U.S.C. § 1988 are to provide meaningful access to the judicial process by private individuals with civil rights grievances, and to force attorneys to critically evaluate the prospects of success of their claim. (App. C, 12a). As to the purposes of 42 U.S.C. § 1988, the Tenth Circuit Court of Appeals in *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983) (en banc), was quite specific:

> Beyond providing a reasonable evaluation of a lawyer's services, the approach set forth in *Hensley* advances the general intendment of section 1988, providing incentive for *meritorious* civil rights litigation. It instructs a lawyer to critically evaluate the prospects of success in each potential civil rights claim, and it encourages the lawyer to proceed only with those claims that are indeed meritorious. The lawyer can go forward with difficult arguments, confident that the client's fee award will reflect the obstacles that the attorney overcomes. *The lawyer can go forward with nonmonetary claims, secure in the knowledge that the fee award will not be diminished on account of the absence of damages.* (Emphasis added).

A refusal to confer "prevailing party" status upon plaintiffs seeking only a substantial monetary award who ultimately receive an insignificant monetary award will not undermine the laudable purposes of 42 U.S.C. § 1988. On the other hand, by refusing to consider the "results obtained" factor set forth in *Hensley* and reaffirmed in *Rivera*, the Court of Appeals' decision undermines one of the purposes underlying 42 U.S.C. § 1988, which is to force attorneys to critically evaluate the prospects of success of their claim.

Indeed, if the Court of Appeals' decision goes unreviewed at this time, the ultimate outcome will be a total erosion of this important purpose. Without the presence of both of the twin purposes underlying 42 U.S.C. § 1988, the balance which is essential to the fair and equitable assessment of attorney's fee awards in civil rights actions will disappear. This Court should grant certiorari to insure that such a result does not occur.

CONCLUSION

In this case, Respondents received no declaratory or injunctive relief, no class action determination, no court supervised operation of the police department for implementation of remedial measures, no determination of an unconstitutional custom or policy and no punitive damages. Respondents did receive an award of attorney's fees which was 6,225 times the damage award in the case. This is not a disproportionate fee award of the type addressed in *Rivera;* this is an unconscionable fee award. Simply stated, such an inequitable and unjust attorney's fee award cannot be allowed to stand.

42 U.S.C. § 1983 is, and should be, a potent weapon in enforcing the law of the land. In such actions, attorney's fees represent an inherent deterrent. The *Rivera* decision motivated respect on the part of policy makers because it served notice that civil rights plaintiffs who prevail on a significant claim will receive attorney's fees, even if those fee awards are not strictly proportional to the results obtained. In this case, the Court of Appeals crossed the line between a disproportionate fee award and an unconscionable fee award. When analyzed objectively, the Court of Appeals' holding serves only to encourage attorneys to ignore the "results obtained" factor in civil rights cases where private damages alone are sought.

The Court of Appeals' opinion does violence to this Court's holding in *Hensley* and *Rivera,* as well as conflicts with the holdings of other Circuits. Where substantial monetary damages alone

are sought, a "moral victory" of an inconsequential monetary award should not entitle the plaintiff to an award of attorney's fees.

If Respondents are "prevailing parties", the Court of Appeals' refusal to properly consider the "results obtained" factor undermines the purposes underlying 42 U.S.C. § 1988. Undoubtedly, the Court of Appeals decision will lead to the assessment of unconscionable fee awards in civil rights cases where monetary damages alone are sought, and insignificant monetary damages are ultimately awarded.

In short, this case represents an ideal opportunity for this Court to further define the parameters of the term "prevailing party" in the context of an attorney's fee award under 42 U.S.C. § 1988. Review in this case is also necessary to insure that fair and equitable attorney's fee awards are made in civil rights actions where substantial monetary damages are sought, and insignificant monetary damages are ultimately awarded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marcia G. O'Brien, one of the attorneys for Petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the eighteenth day of December, 1987, I served copies of the foregoing Petition for Writ of Certiorari on Respondents, Jewell Nephew, Rafus Perkins, Elaine Neloms and Charles Fulton, by depositing copies of the Petition for Writ of Certiorari in the United States Post Office located at 1823 Stout Street, Denver, Colorado, with first class postage prepaid, and properly addressed to their counsel of record:

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APPENDIX "A"

IN THE

UNITED STATES DISTRICT COURT

For The District of Colorado

Civil Action No. 81-M-816

JEWELL NEPHEW, et al.,

Plaintiffs,

v.

THE CITY OF AURORA, et al.,

Defendants.

REPORTER'S TRANSCRIPT
COURT'S RULING

Proceedings before the HONORABLE RICHARD P. MATSCH, U.S. District Judge, United States District Court for the District of Colorado, beginning at 1:30 o'clock p.m. on the 22nd day of July, 1983, in Courtroom 202, United States Courthouse, Denver, Colorado.

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PROCEEDINGS

THE COURT: I am ready to rule in this matter. Not because I am confident of the ruling; quite to the contrary. I think there is, with exception for the problem of determining the appropriate sentence to confinement in criminal cases, no more difficult problem for judges these days than the determination of an appropriate fee award under 42 United States Code, Section 1988.

The difficulties, of course, are obvious and apparent to us all, and I, in this regard, applaud the effort of Judge Logan in the Tenth Circuit Court of Appeals in the *Ramos against Lamm* case where really in response to something of a plea made by another judge in this Court for guidance in dealing with these questions, the Circuit—this panel of this Circuit—did attempt to give us guidance, and did indeed set out an outline of the steps to be followed in making the analysis.

Now with respect to the matter of carefully constructing contemporaneous time records and the like, I do read that as prospective. We are advised by the Circuit to advise lawyers in the future that fee awards would be considered only upon the basis of meticulous, contemporaneous time records, so in that regard I am not going to use any reduction because of the nature of the time records that have been summarized in the motion that's now before me, and as I understand Defendant's counsel, it is not a serious dispute about time records in this case, anyway. The dispute relates to the compensation for certain services.

I think the matter that gives me the greatest trouble, perhaps, and the area in which I might have some dissent, if I had the power to dissent, with some of the language in *Ramos,* is the section in which the Court, the panel for the Court, and speaking through Judge Logan, discusses the nature of civil rights litigation, and I am trying to find the exact statement here.

Yes. In the language in the opinion referring to the volume of civil rights cases filed in federal courts, according to the statistics

kept by the Administrative Office and the numbers of appeals and such litigation, and the statement that this valid litigation indicates that civil rights litigation has become a common specialty.

Now, of course, the Court in that case was considering prison conditions as the type of civil rights litigation involved, but I think it's fair to make some observations based upon my own experience with civil rights litigation involving lawsuits with police departments and police officers that there is a special attention involved in that kind of lawsuit.

And I am not saying this in a manner that is accusatory of police. I don't want to be suggesting that I have preconceptions with respect to one side or the other of such cases, but they are difficult trials. They are difficult for me as a trial judge, at any rate, because they involve highly emotional situations.

They involve potential for great violence in a community, and we are aware of the recent history of the United States and in communities in this republic where what may have started as minor incidents erupted into major disobedience and destruction. And there is always that potential.

And in many respects it's my opinion that for our Courtrooms to be open to these lawsuits, and for those events to come forward and be resolved by a jury in the relative quiet of courtrooms, and utilizing the adversary process, we have done a great deal to preserve order in the United States.

But the persons who are often plaintiffs in these cases are not—it's not like representing a tax client in a case that involves a lot of money in this dispute with the Internal Revenue Service over a tax shelter program or something of that nature.

You are talking about people who take the witness stand and testify, and testify about something that recreates time in their lives when there was great emotion and perhaps great danger.

The same is true with the police officers. And they confront each other here in a courtroom, and it's difficult. It's difficult for counsel on both sides.

And I think sometimes when you engage in litigation against police departments there is a lot of looking in your rear view mirror when you drive down the street.

Now, I say that because I think that it is not true that the ordinary, competent trial lawyer, if there is one, and I am not saying that disparagingly, it's just that I don't know where that standard fits in because most of us who engage in trial practice are involved within specialties within trial work. Trial work itself does not seem to be a specialty.

We have plaintiff's lawyers and defendant's lawyers in connection with personal injury litigation, and a lot of other categories of trial practice, so I don't know what is the reasonably competent general trial attorney anymore.

But I don't think that 1983 litigation is something that can be handled effectively by "an ordinarily competent trial attorney."

Some mention has been made about an excess amount of research with respect to 1983. Any lawyer or any judge, for that matter, who comes into the Courtroom to try a 1983 case who hasn't spent some time reading the most recent 1983 cases is ill prepared.

What all of us know is that the Supreme Court of the United States, and certainly all of us below it, have a lot of trouble trying to articulate what is a claim for relief and what are the defenses in these cases in which we have the challenge to official conduct as an infringement of individual liberty.

I spend more time reading cases under 1983 in Bivins and this area of the law than I think I read any other type of case, and it's simply indicative of the struggle to try to articulate standards that can be utilized in the trials of these matters.

The comparison between state law torts and constitutional rights. When is a matter a matter of simply assault and battery or false arrest, and when is it a matter under the Fourteenth Amendment.

Well, I don't think we in the courts have done a very good job of giving that guidance, and I am including myself in that lament.

So, I think 1983 litigation is difficult, and it is, I think, a type of case in which most lawyers don't venture. What I am saying is that it's my finding and conclusion that this is an area of some specialization, and that the lawyer seeking the payment in this case, Mr. Penfield Tate, has been in this Court in many such cases and other types of civil rights litigation, and I would expect his hours to be productive toward the objective of his clients in the case.

With respect to measuring the question of how much success was achieved, as we must, compared to the scope of the litigation, I find a lot of trouble with that in that in these days, and this is something in common I think as the civil rights cases that have in common with all other litigation, we have so many lawyers now, and there is sufficient amount of cannibalism among lawyers, that every complaint almost has to meet the requirements of the medical analogy and medical equivalent of a brain scan. If you don't claim everything that you could possibly claim in a case, including injunctions and everything else, somebody down the road may say you haven't been competent in your representation of your client.

So, measuring the final result by a verdict against the original complaint has to be done with, I think, some considerable skepticism about what was reasonably expected at the beginning, and I think that again we have somewhat diluted Rule 11 by the way in which we practice law, and may be required to practice law under modern conditions.

The principal problem in this case for me is how to evaluate this related state case. I have no trouble with discounting certain aspects of that state case as, for example, I don't think that we should consider the time spent in getting ready to pick a jury, and then ultimately resulting in a mistrial because of what apparently was a trial inefficiency in the state court, and I am not saying that to condemn the state court, but when you look at the award of an attorney's fee, of course, you have to conside that the other side has to pay it. There are two sides to the attorney's fee award always; the payor and the payee. I don't think that the Defendants are responsible for that lost time.

Mr. Kelly has expressed the opinion that these lawsuits were essentially one lawsuit, and, of course, they did arise out of a common set of operative facts, no question about that. It was the same series of events on the same night which led to these two cases.

And in one situation the police got to court first, and in the other situation the second parties to court just sort of by the difference in the way the courts operated, I guess, the plaintiffs here got to trial first. The trial that went on through.

We also had four plaintiffs in this case, and two of them prevailed, not four. So I think some discounting is required for the fact that two of these plaintiffs lost their case.

With respect to the amount of the award, I am governed by the Tenth Circuit opinion in that, as I indicated to counsel, to Mr. Richardson in his argument. But I also agree with it.

It is not really so much how much money a jury decides to give or I shouldn't say give—to award—as it is a determination in the court of law by a jury as to who was right under the circumstances, and labeling in this case the conduct of the police, these two police officers as it relates to these two plaintiffs who did prevail at trial, that in this circumstance the police were wrong. That's important.

It's important for the police as well as for the plaintiffs because it gives us an indication through these representatives of the community of what standards of police conduct should prevail, and that serves—I hope that serves—as some guidance for the police with respect to how they perform their difficult task.

These are the things that I have considered, and I don't believe that I can quantify them further rather than by simply saying that in my judgment, given the fact that we had four plaintiffs, we had two lawsuits, two different court actions, that who did prevail essentially got what amounts to a declaratory judgment through the jury verdict, that the appropriate standard for the reasonable time for the prevailing plaintiff is 100 hours, and the appropriate fee is $125 an hour, and I am awarding $12,500, and with that I am going to enter judgment on the verdicts and on this fee award.

With respect to Mr. Kelly's time, the Tenth Circuit case does say that expert witness fees are not compensable, and, accordingly, it would not be appropriate to amend your application, Mr. Tate, to ask for a fee for him as a witness.

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APPENDIX "B"

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON,

Plaintiffs-Appellees,

v.

CITY OF AURORA, by and through its MAYOR and CITY COUNCIL, STAN THOMISON and KENNETH L. PETERSON,

Defendants-Appellants.

No. 83-2053

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
(D.C. Civil Action No. 81-M-816)

Submitted on the Briefs:

Penfield W. Tate, II, of TRIMBLE, TATE & NULAN, Denver, Colorado, Attorneys for Plaintiffs-Appellees.

Charles H. Richardson, Patrick E. Kowaleski, and Kathleen M. Schoen, Aurora, Colorado, Attorneys for Defendants-Appellants.

Before BARRETT, DOYLE, and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a), Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The issue in this appeal concerns the proper measure of attorney's fees to be awarded a prevailing party under 42 U.S.C. § 1988. Plaintiffs here sought to prove at trial that they were assaulted, battered, and falsely arrested by Aurora, Colorado (the "City"), police officers pursuant to a custom or policy of the City to discriminate against blacks. Injunctive and declaratory relief and damages were sought against the City, its Mayor, and its City Council; at the close of the plaintiffs' case, however, the City, Mayor, and City Council were removed from the case upon the district court's grant of their motion for a directed verdict.

The case then proceeded to trial on the plaintiffs' claims for compensatory and punitive damages in the amount of $2 million against the individual police officers. The jury found in favor of plaintiffs Fulton and Perkins and against plaintiffs Nephew and Neloms. The jury awarded one dollar ($1.00) each to Fulton and Perkins as compensatory damages; no punitive damages were awarded.

In its ruling upon Fulton and Perkins' motion for attorney's fees, the district court reduced the amount sought by a portion of the time spent on a related state case,[1] and then reduced that amount further on the basis that only two of the four plaintiffs prevailed. The district court expressly refused to reduce the award, as the defendants urged, on the grounds that plaintiffs Fulton and Perkins had won only nominal damages. Accordingly, the court awarded $12,500 as a reasonable fee under the circumstances. The issue therefore becomes whether, in a § 1983 case in which plaintiffs proceed only to litigate monetary damages, the attorney's fees awarded should be reduced if the plaintiffs in fact are awarded only nominal damages of $2.00.

[1]The police officers, Thomison and Peterson, were the first to file suit as a result of the underlying incident in this case. Their suit in state court for assault and battery was eventually dismissed by stipulation; the case then proceeded to trial in federal court under 42 U.S.C. § 1983 based on the plaintiffs' combined claims.

Although this Court has on many occasions examined the proper measure of attorney fees under 42 U.S.C. § 1988, it has yet to address the precise issue presented in this appeal. There is language in *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983), stating that fee awards should not be reduced under the circumstances of the present case: "Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice." In *Ramos* this reasoning was justified on the basis that "[p]arties acting as private attorneys general should be reasonably compensated for their vindication of the public policy even if they themselves do not receive a large financial benefit." *Id.* The plaintiffs in the present case argue that the district court's award of attorney's fees should therefore not be reduced because the jury did in fact find that their constitutional rights had been violated, thus vindicating their primary purpose in bringing suit.

Ramos was not the proper vehicle for this Court to expound on the significance of a nominal monetary recovery in a § 1983 suit in which substantial damages are sought. Monetary damages were not at stake in *Ramos*. Rather, *Ramos* was a suit that concerned the constitutionality of conditions in Old Max, Colorado's maximum security prison. The plaintiffs there sought only declaratory and injunctive relief—as opposed to damages—because of the antiquated and inadequate conditions of the prison. Thus, the language from this Court's *Ramos* opinion quoted above is dicta. It is not binding precedent as to the issue with which we are here confronted.

It is our view that the quoted language from *Ramos*, while dicta, does not fully address the purposes underlying the attorney's fees provision in the civil rights laws. The purpose of § 1988 is not simply "to encourage private enforcement of the civil rights laws," *Id.* at 557, even though such might be viewed as a fair

statement of the purpose behind the civil rights laws generally. But as to the purpose of § 1988 in particular, this Court has been specific:

> Beyond providing a reasonable evaluation of a lawyer's services, the approach set forth in *Hensley* advances the general intendment of section 1988, providing incentives for *meritorious* civil rights litigation. It instructs a lawyer to critically evaluate the prospects for success in each potential civil rights claim, and it encourages the lawyer to proceed only with those claims that are indeed meritorious. The lawyer can go forward with difficult arguments, confident that the client's fee award will reflect the obstacles that the attorney overcomes. The lawyer can go forward with nonmonetary claims, secure in the knowledge that the fee award will not be diminished on account of the absence of damages.

Cooper v. Singer, 719 F.2d 1496, 1502 (10th Cir. 1983) (in banc) (emphasis added).

Although *Cooper* was decided after *Ramos*, both were based on the Supreme Court's reasoning in *Hensley v. Eckerhart*, 461 U.S. 424 (1983). In *Hensley*, after adopting a typical formulation of the term "prevailing party"[2] for purposes of the award of attorney's fees, the court proceeded to describe several factors to be considered in determining a reasonable fee award. One "important factor" in determining the "reasonableness" of a fee award is the "results obtained." *Id.* at 434. If the plaintiff obtains excellent results, his attorney should receive a fully compensatory fee. *Id.* at 435. If, on the other hand, the plaintiff achieves only limited success, simply multiplying "the hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount." *Id.* at 436. As the Court explained: "Congress has not authorized an award of fees whenever it was rea-

[2]"[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." 461 U.S. at 433.

sonable for a plaintiff to bring a lawsuit or whenever conscientious counsel tried the case with devotion and skill. Again, the most critical factor is the degree of success obtained." *Id.*

While we have no trouble finding that the plaintiffs in the instant case are the prevailing parties even though they won only nominal damages, *see, e.g., Skoda v. Fontani,* 646 F.2d 1193 (7th Cir. 1981), we conclude that the district court, in determining the reasonableness of the fee award, abused its discretion by not discounting the fee award in light of the fact that plaintiffs won only nominal damages. Other courts have followed such an approach, *see, e.g., Burt v. Abel,* 585 F.2d 613, 618 (4th Cir. 1978); *Perez v. University of Puerto Rico,* 600 F.2d 1 (1st Cir. 1979). We believe this approach furthers the twin purposes of § 1988 of providing meaningful access to the judicial process to private individuals with civil rights grievances and of forcing attorneys to critically evaluate the prospects of success of their claim. We recognize that this holding will likely compel attorneys to prognosticate with some degree of accuracy their prospects of success in terms of dollars and cents. Even so, we believe it to be a necessary burden in an attempt to ensure that attorneys pursue only meritorious civil rights claims.

By this holding we do not imply that an award of nominal damages necessarily means that a corresponding fee award must also be nominal. However, where, as here, a plaintiff seeks substantial damages but wins only nominal damages, the award must be reduced to account for the plaintiffs' very limited success.[3]

REVERSED AND REMANDED.

No. 83-2053—NEPHEW, et al. v. CITY OF AURORA, et al.

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[3]As the Supreme Court recognized in *Hensley,* there is no precise rule for making this determination. "The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." 461 U.S. at 436-437.

McKAY, Circuit Judge, dissenting:

The issue in this case is whether attorneys' fees awarded under section 1988 should be reduced when the plaintiffs were awarded only nominal damages in a civil rights suit seeking only monetary damages.

Four plaintiffs brought this suit against the City of Aurora, its mayor, city council, and several individual police officers, alleging that they had been assaulted, battered and falsely arrested by the police officers pursuant to a city custom or policy to discriminate against blacks. The city, mayor and city council were dismissed from the case at the close of plaintiffs' evidence, and the case proceeded to trial on plaintiffs' claims for compensatory and punitive damages against the individual police officers. The jury found in favor of two of the plaintiffs and against the other two, and awarded the two prevailing plaintiffs one dollar each in compensatory damages.

The trial court, in setting the attorneys' fees, reduced the requested award to reflect time spent on a related state court action, and reduced it further because only two of the four plaintiffs had prevailed. The court refused, however, to reduce the award to reflect the fact that the plaintiffs had won only nominal damages.

The majority reverses the district court, holding that the attorneys' fee must be reduced "to account for the plaintiffs' very limited success." Maj. Op. at 6. To reach its decision, the majority expressly rejects language to the contrary in *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983), in which this court stated that:

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. *We reject this practice.* The amount of the monetary recovery is not as significant as the policy being vindicated. Section 1988 was designed to encourage private enforcement of the civil rights

> laws. Parties acting as private attorneys general should be reasonably compensated for their vindication of the public policy even if they themselves do not receive a large financial benefit.

(emphasis added). I believe that the result reached by the majority is inconsistent with the case law and undermines the intent of the civil rights laws. Accordingly, I must dissent.

The primary purpose of section 1988 is "to encourage private enforcement of the civil rights laws," *Ramos*, 713 F.2d at 557, and to provide "incentives for meritorious civil rights litigation." *Cooper v. Singer*, 719 F.2d 1496, 1502 (10th Cir. 1983). To achieve this dual purpose, the Supreme Court held in *Hensley v. Eckerhart*, 461 U.S. 424, 440 (1983), that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." Similarly, in *Cooper*, this court stated that "the fee award must be tied to the reasonable value of the services rendered in light of the results achieved." 719 F.2d at 1501.

The majority finds that, where monetary damages are sought, the "success" of the suit is a function of the damages actually awarded and that *Cooper* and *Hensley* thus require the court to reduce the fee to reflect the fact that the plaintiffs succeeded in proving only nominal damages. I cannot agree. Civil rights suits seek primarily to vindicate constitutional rights. The amount of monetary damages awarded is not, and should not be, the measure of the success of a suit in achieving that goal.

In *Hensley*, the issue was whether a plaintiff who had raised several issues or claims and had prevailed on only some of those issues could recover fees for legal services on the unsuccessful claims. Because plaintiffs are considered "prevailing parties" for purposes of awarding attorneys' fees if they "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit," *Hensley*, 461 U.S. at 433

(quoting *Nadeau* v. *Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978)), attorneys' fees may be awarded if a plaintiff succeeds on only one of many issues or claims. In such a case, the Court felt that it would be a windfall to the attorneys to award fees for time spent pursuing all of the claims, the majority of which were not successful. *See* 461 U.S. at 436 ("had respondents prevailed on only one of their six general claims . . . a fee award based on the claimed hours clearly would have been excessive"). In addition, the Court feared that attorneys would be encouraged to pad their meritorious claims with non-meritorious ones if they felt that they could recover fees for all of the time they expended on the case if their one meritorious claim succeeded.

The district court has followed the mandate of *Hensley* by reducing the award to reflect the fact that some of the time was spent pursuing claims for the two plaintiffs who did not prevail. As for the prevailing plaintiffs, however, *Hensley* does not require that their fee awards be reduced. The prevailing plaintiffs brought only one claim—a claim seeking to vindicate their right to be free of officially sanctioned discrimination. The jury found in their favor on this claim. The fact that they did not prove that they were monetarily harmed by the unconstitutional treatment does not alter the fact that they were fully successful in proving the one constitutional claim that they raised.

Ramos v. Lamm was decided after, and relied on, the decision in *Hensley*. It was thus with full awareness of the Supreme Court's reference to "results obtained" that this court wrote that "[t]he amount of the monetary recovery is not as significant as the policy being vindicated." 713 F.2d at 557. The public policy against constitutional violations is vindicated whenever a defendant is found to have acted unconstitutionally, regardless of whether the plaintiff is found to have been monetarily harmed.

The language in *Cooper v. Singer* on which the majority relies in rejecting *Ramos* simply cannot support its conclusion. Rather, it simply parallels the decision in *Hensley* that where a plaintiff

has brought a number of different claims and has succeeded in only some of those claims, the fee award should take into account the plaintiff's limited success. It does not indicate that the fee should be reduced to reflect the amount of damages awarded. Indeed, in *Cooper* the court twice approvingly cited *Ramos'* articulation of the factors to be considered in setting fee awards—an articulation which explicitly rejected the analysis the majority adopts. *See Cooper*, 719 F.2d at 1501 n.8 (referring to the indication, in *Ramos*, of factors "that will result in *reduction* or enhancement of the fee award"), 719 F.2d at 1507 (emphasis added). Thus *Cooper*, on which the majority relies in rejecting *Ramos*, actually supports the proposition that *Ramos* is the correct interpretation of the law.

It is because of society's interest in the enforcement of constitutional rights, even when there has been *no* monetary harm, that the majority of the courts have held that a plaintiff is a "prevailing party" entitled to attorneys' fees when only nominal damages have been awarded. *See, e.g., Perez v. University of Puerto Rico*, 600 F.2d 1, 2 (1st Cir. 1979); *Burt v. Abel*, 585 F.2d 613, 618 (4th Cir. 1978).* I think that similar considerations mandate that a fee award not be reduced simply because only nominal damages have been awarded. Congress explicitly stated that the fees awarded should not be reduced because the rights involved may be nonpecuniary in nature. S. Rep. No. 1011, 94th Cong. 2d Sess. 6, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5908, 5913. The right not to be subjected to discrimination is difficult to measure in monetary terms. As in the area of procedural due process, where the Supreme Court has expressly held that due process

*The majority follows these cases in finding that the parties are prevailing parties entitled to fees despite the fact that they received only nominal damages. What both these cases and the majority opinion fail to recognize, however, is that the policy of encouraging private citizens to enforce their constitutional rights and the importance to society that constitutional rights be vindicated—the factors which lead them to view the parties as prevailing parties despite the award of nominal damages—lead to the further conclusion that attorney's fees should not be reduced because only nominal damages were awarded.

violations should be actionable for nominal damages "because of the importance to organized society that procedural due process be observed," *Carey v. Piphus*, 435 U.S. 247, 266 (1978), society has an interest in ensuring that individuals do not suffer from officially sanctioned discrimination. This interest is vindicated whenever a plaintiff proves, in open court, that he or she has suffered discrimination. To make the fee commensurate with the monetary damages awarded for the constitutional violation would undervalue the importance of this interest and would overemphasize the importance of damages in civil rights litigation. *Cf. Cooper*, 719 F.2d at 1503 (finding that limiting section 1988 awards to the maximum recoverable under contingent fee contracts would overemphasize the importance of damages).

In addition, to reduce the fee award because the plaintiff, who has been constitutionally wronged but did not seek injunctive relief, did not succeed in proving monetary damages would discourage lawyers from representing plaintiffs in pursuit of claims with little monetary value. As Congress made clear in enacting section 1988:

> If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must recover what it costs them to vindicate these rights in court.

S. Rep. at 5910.

It is undeniable that the jury found two of the plaintiffs had suffered discrimination at the hands of police officers acting under color of state law. This verdict, with or without the award of monetary damages, is a vindication of the societal interest in enforcement of the civil rights laws. Because I believe this court should continue to follow the views expressed in *Ramos*, I would affirm the district court's refusal to consider the amount of damages awarded as a factor in setting attorney's fees. In addition, I would award the plaintiffs additional attorney's fees for the cost of prosecuting this appeal. Accordingly, I must dissent.

APPENDIX "C"

JANUARY TERM—March 4, 1986

Before Honorable William J. Holloway, Jr., Honorable Oliver Seth, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, CHARLES FULTON, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

vs.

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL; STAN THOMISON and KENNETH L. PETERSON,

Defendants-Appellants.

No. 83-2053

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the Court orders as follows:

1. The petition for rehearing is granted by the panel that rendered the decision sought to be reheard.

2. The opinion of this Court issued July 10, 1985, is hereby withdrawn.

3. The judgment of this Court filed July 10, 1985 is hereby vacated.

There shall be no briefing in the case pending further order of this Court and the decision of the Supreme Court in *Rivers v. City of Riverside*, 106 S. Ct. 244 (1985), *see* U.S.L.W. 3232 & 3270 (1985).

The court was polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, and the suggestion for rehearing en banc is granted.

Judge Moore did not participate.

Judges Barrett, Tacha and Baldock voted to deny rehearing en banc.

/s/ HOWARD K. PHILLIPS

HOWARD K. PHILLIPS, *Clerk*

APPENDIX "D"

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JEWELL NEPHEW, RAFUS PERKINS, ELAINE NELOMS, and CHARLES FULTON, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellees,

v.

THE CITY OF AURORA, by and through its MAYOR and CITY COUNCIL; STAN THOMISON and KENNETH L. PETERSON,

Defendants-Appellants.

No. 83-2053

OPINION ON REHEARING EN BANC

Marcia G. O'Brien (Patrick E. Kowaleski, Charles H. Richardson and Kathleen M. Schoen also on the briefs), Aurora, Colorado, for Defendants-Apellants.

Penfield W. Tate, II, Denver, Colorado, for Plaintiffs-Appellees.

Before HOLLOWAY, Chief Judge, BARRETT, McKAY, LOGAN, SEYMOUR, ANDERSON, TACHA and BALDOCK, Circuit Judges.

McKAY, Circuit Judge.

We consider, en banc, the issue of an appropriate measure of attorney's fees under 42 U.S.C. § 1988 when the sole recovery to

the prevailing party in the underlying action is an award of nominal damages.

Plaintiffs, Jewell Nephew, Rafus Perkins, Elaine Neloms and Charles Fulton, filed suit against two Aurora police officers and the City of Aurora for infringing upon their constitutional rights in violation of 42 U.S.C. §§ 1981, 1983, 1985 (1982). Plaintiffs alleged they had been assaulted, battered and subjected to false arrest by the police officers pursuant to discriminatory policies against blacks sanctioned by the Mayor, City Council and City of Aurora. Plaintiffs sought compensatory damages, punitive damages and injunctive relief. The district court directed a verdict in favor of the Mayor and City Council at the end of plaintiffs' case. The jury subsequently found in favor of the police officers with respect to two plaintiffs but found the constitutional rights of the remaining plaintiffs had been violated. The jury awarded each of the prevailing plaintiffs nominal damages of $1.

Plaintiffs then moved for attorneys' fees under 42 U.S.C. § 1988 (1982).[1] The district court reduced the number of hours requested by a portion of time spent on a related state case[2] and because only two of the four parties prevailed. The court awarded $12,500 in fees to plaintiffs for 100 hours work at a rate of $125 per hour. On appeal, a divided court held that when a plaintiff seeks substantial damages but is awarded only nominal damages, the award must be discounted to compensate for plaintiffs' very limited success. *Nephew v. City of Aurora*, 766 F.2d 1464, 1467 (10th Cir. 1985). Upon petition for rehearing, we decided to

[1]42 U.S.C. § 1988 (1982) provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[2]The police officers initially filed suit against plaintiffs in state court and plaintiffs counterclaimed. After trial in the federal case, the state action was dismissed by stipulation.

reconsider the issue en banc in light of the recent Supreme Court decision in *City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986).

I.

Section 1988 was created by the Civil Rights Attorney's Awards Act of 1976, Pub. L. No. 94-559, 1976 U.S. Code Cong. & Admin. News (90 Stat.) 2641. The legislative history behind the bill refers to the appropriate standard for determining fees as the twelve-factor test set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974).[3] *See* H.R. Rep. No. 1558, 94th Cong. 2d Sess. 8; S.R. No. 1011, 94th Cong. 2d Sess. 4, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5913. The Senate Report also states that attorneys' fees should not be reduced because the rights involved may be nonpecuniary in nature. That accords with comments in *Johnson* that consideration of the amount of damages awarded should not "obviate court scrutiny of the decision's effect on the law." 488 F.2d at 718.

The Supreme Court's first opinion in the area, *Hensley v. Eckerhart*, 461 U.S. 424 (1983), considered whether "a partially prevailing plaintiff [could] recover an attorney's fee for legal services on an unsuccessful claim." *Id.* at 426. The lodestar incorporates many of the *Johnson* factors and is considered the reasonable fee required by section 1988. Once determined, however, the figure can be adjusted upward or downward, according to certain factors, one of the most important of which is the "results

[3]The factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill necessary to properly perform the legal service; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

obtained." *Id.* at 434. In *Hensley* the Court remanded the case because the district court had not properly considered the results obtained. Although the Supreme Court held that the extent of a plaintiff's success is a crucial factor in determining attorneys' fees, the court did not bar the award of fees for unsuccessful claims. Instead it cautioned that "the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* at 440.

In *Rivera,* the Court affirmed the application of the lodestar to a civil rights action in which a plaintiff recovers only monetary damages. Plaintiffs initially sued the City of Riverside, its police chief and thirty police officers on several state claims and alleged violations of their constitutional rights. Plaintiffs sought compensatory and punitive damages and injunctive relief. The court dismissed suits against seventeen of the officers on motion. The jury found in favor of plaintiffs and against the City and five of the officers. It awarded plaintiffs $33,350 in compensatory and punitive damages. The district court awarded attorneys' fees of $245,456.25 to plaintiff: 1,946.75 hours at $125 per hour and 84.5 hours at $25 per hour for law clerks. The Supreme Court remanded the trial court's initial award for reconsideration in light of *Hensley.* The district court arrived at the same conclusion and was affirmed on appeal. Defendants appealed again to the Supreme Court.

A five-member majority affirmed the trial court's fee award, but the majority was divided in its analysis. Justice Brennan, writing for the plurality, initially focused on *Hensley's* characterization of the nature of "results obtained," "[w]here a plaintiff has obtained excellent results, his attorney should recover a full compensatory fee . . . the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." *Rivera,* 106 S. Ct. at 2692 (quoting *Hensley,* 461 U.S. at 435). Extending the *Hensley* analysis to *Rivera,* the opinion explicitly rejected defendant's contention that the lodestar

approach was inappropriate to a civil rights action in which monetary damages are the only recovery. *Id.* at 2694. The opinion also rejected a requirement that attorneys' fees be conditioned on, or proportionate to, a monetary damages award. *Id.* at 2694, 2698. Although it noted that the amount of damages is relevant to the fee awarded, the opinion distinguished a civil rights action from private tort litigation because the civil rights plaintiff also vindicates "important civil and constitutional rights that cannot be valued in monetary terms." *Id.* at 2694. That vindication often can include important social benefits that are not reflected in nominal damages. Thus, a proportionality rule would focus the fee evaluation on only one result obtained. It would also undermine the legislative intent underlying the Act: providing adequate compensation to attorneys to encourage them to accept civil rights cases in which monetary recovery might be limited.

Justice Powell, concurring, did not interpret *Hensley*'s analysis as broadly as did the plurality. Nevertheless, he also did not reject the lodestar approach when plaintiff's only recovery is monetary damages. Instead, he implicitly used the lodestar when he wrote: "the most critical factor [in the *final* determination of fee awards] is the degree of success obtained." *Id.* at 2700 (Powell, J., concurring) (quoting *Hensley*, 461 U.S. at 436) (emphasis added). In considering the degree of success obtained, the concurrence recognizes that the court may weigh the vindication of constitutional rights in addition to the award of monetary damages. Justice Powell notes that the award of private damages will rarely be said to benefit the public interest to an extent justifying such disproportionality as existed between the damages and fees in *Rivera*. *Id.* at 2700 n.3. Nevertheless, he also states that neither history nor court decisions support a "rule" of proportionality. *Id.* at 2700. Thus, he seems to interpret *Hensley* to allow widely disproportionate fees in fewer cases than would the plurality. The concurrence requires particularly careful consideration of the amount of damages awarded in assessing fees but still allows a

court discretion to award fees greater than the damages in those cases in which the vindication of constitutional rights is an important element of success. Justice Powell was able to affirm the district court's decision in *Rivera* because the district court's findings of fact clearly explained the factors underlying its fee award, including the close relationship of the claims, counsel's skill in handling the case, the difficulty in pursuing the action, the excellent results achieved for plaintiffs and, in particular, the benefit to the public in the vindication of plaintiff's constitutional rights. *Id.* at 2699.

Therefore, following *Rivera*, we cannot assume the trial court erred despite the great disproportionality between the fee awarded and the damages recovered in the present case. Discretion to award fees lies ultimately with the district court. *Hensley*, 461 U.S. at 437. We must determine whether the court's findings of fact are clearly erroneous and, in light of those findings, whether the trial court abused its discretion in awarding the fee.

II.

The plaintiffs, who were awarded judgment, were clearly prevailing parties. Their fee request was for 180.5 hours at $125 per hour. The time records themselves were not disputed, only the compensation for services. Record, vol. 2, at 2-3. The district court began its evaluation of fees with the lodestar. In determining the reasonable amount of hours for litigation, the court discussed the difficulty for both counsel and the parties in bringing a civil rights action because of the delicate nature of relations among counsel, citizens, and the city and its representatives. The court also noted the extensive preparation required for a 1983 case and the difficulty in articulating a claim for relief. *Id.* at 5-6. Further, the court noted the ability of plaintiffs' counsel in civil rights litigation. Despite its consideration of those factors supporting counsel's work, the district court reduced the number of hours requested. It specifically stated the basis for that reduction: (1) certain aspects of a related state claim were separable from

the federal suit, and (2) only two of the four plaintiffs were successful. *Id.* at 7-8. Accordingly, the court found the reasonable number of hours requested to be 100. The court further found that $125 per hour was an appropriate rate and awarded plaintiffs $12,500 in fees. After reviewing the record, we do not conclude that the court's findings are clearly erroneous. The issue before us then is whether the trial court abused its discretion in not departing from the lodestar due to plantiffs' limited success.

As *Hensley* requires, after determining the lodestar, the court discussed the results plaintiffs had obtained. The amount of monetary damages in the present case was less important than the judgment against the police officers' conduct. The district court stated:

> [The judgment is] important for the police as well as for the plaintiffs because it gives us an indication through these representatives of the community of what standards of police conduct should prevail, and that serves—I hope that serves —as some guidance for the police with respect to how they perform their difficult task.

Id. at 8–9. Because the district court found that the most important aspect of the judgment was the vindication of plaintiffs' civil rights and its message to the police department, we cannot conclude that the trial court's award was an abuse of discretion.

Thus, we need not address whether the case before us is one which might fall between the plurality and concurring opinions. The district court has provided a record sufficient to satisfy the concurrence. We cannot find error in the detailed findings of fact concerning the lodestar and the nature of plaintiffs' success nor that the trial court abused its discretion in awarding the fee.

The trial court's judgment is AFFIRMED.

No. 83-2053, JEWELL NEPHEW, et al. v. THE CITY OF AURORA, et al.

BARRETT, Senior Circuit Judge, with whom TACHA and BALDOCK, Circuit Judges, join, dissenting:

Four black plaintiffs brought this 42 U.S.C. § 1983 lawsuit alleging that, motivated by racial discrimination, two white police officers serving the City of Aurora, in response to a late evening noise complaint, entered the residence of appellee Perkins and there assaulted, battered, bruised and falsely arrested plaintiffs. Sued were the City of Aurora, its Mayor and City Council and the two Aurora police officers. The plaintiffs charged that the police officers' alleged intentional racially discriminatory actions were in accord with customs and policies of the City of Aurora, its Mayor and City Council, which "permitted its officers to beat, batter, bruise and abuse its black citizens. . . . " (R., Vol. I, pp. 4, 9.) The facts were in sharp dispute. The police officers contended that it was they who were subjected to assault and battery at the hands of plaintiffs. Plaintiffs sought injunctive and declaratory relief and $2 million in damages, compensatory and punitive.

At the close of plaintiffs' case-in-chief, and upon motion for directed verdict, the City of Aurora, the Mayor and City Council were dismissed from the suit. We have held that "a directed verdict is justified 'only if the proof is all one way or overwhelmingly preponderant in favor of the movant as to permit no other rational conclusion.' " *Kiner v. Northcutt*, 424 F.2d 222, 223 (10th Cir. 1970). Furthermore, and significantly, the court eliminated injunctive and declaratory relief from plaintiffs' case. Appellees do not challenge those rulings. Thus, the case went forward only and exclusively for jury determination of the damages liability issue. The only *real* relief ever sought by the plaintiffs in this case was $2 million in damages, both compensatory and punitive. That was the posture of plaintiffs' case at all times.

The plaintiffs' complaint alleged the following "unlawful practices": The City of Aurora was intentionally engaged in unlawful deprivation of rights of black persons by utilizing its police

department to commit assaults and batteries upon black persons, to invade the privacy of black persons, to unlawfully arrest black persons and by refusing "to accord to black persons any respect for their rights as human beings and as citizens of the United States." Plaintiffs' Complaint, Par. 7. The complaint alleged that the defendant police officers (1) "invaded" the privacy of plaintiffs' home on the evening of May 26, 1979, and (2) while in the home "battered, bruised and assaulted" the plaintiffs and (3) further subjected plaintiffs to "outrageous conduct," placed plaintiffs in "grave fear and mental anguish" and "in fear of grave bodily harm or loss of life." These allegations, if supported by the evidence in the eyes of the jury, could have resulted in a substantial monetary award. But these allegations did not stand up against the defendants' testimony. The police officers testified that it was they who had had been subjected to assaults and batteries at the hands of the plaintiffs. It was in this context that the jury returned a compensatory damages award of $1.00 to only two of the four plaintiffs.

The majority opinion states that "the amount of monetary damages in the present case was less important than the judgment against the officers' conduct" in vindication of plaintiffs' civil rights and "its message to the police department." Slip Opinion, p. 9. [App. D, 26a]. What civil rights of the plaintiffs were violated? What sort of vindication is indicated by virtue of a $1.00 award? It cannot be seriously contended that the jury believed that these plaintiffs were subject to assault and battery, false arrest and outrageous conduct. What, then, is the "message" the trial court and this court are conveying to the City of Aurora police officers? The question defies a logical, reasonable answer. It was *not* answered by the district court, except in general, undefined platitudes. If the police officers did wrong, they are left groping for guidance and direction.

This suit was at all times aimed solely at monetary damage relief. It utterly failed in that regard. Even so, the trial court

erroneously refused to consider the fact that plaintiffs Fulton and Perkins recovered only the $1.00 nominal damage award in fixing plaintiffs' § 1988 attorney fee award.[1]

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the Supreme Court made it clear that in determining a § 1988 fee award "[T]he extent of a plaintiff's success is a *crucial* factor," *id.* at 440 (underlining supplied) and "[w]here the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained." *Id.* Here, the district court did not explain how the award of attorney fees of $12,500 was reasonable in light of the $1.00 nominal damage award to two of the four plaintiffs, well knowing that monetary relief was the only possible relief available on the evidence. The need for such an explanation was clearly spelled out in *Marek v. Chesny*, 473 U.S. 1 (1985). The Supreme Court there said:

> Section 1988 encourages plaintiffs to bring meritorious civil rights suits . . . Section 1988 authorizes courts to award only "reasonable" attorney's fees to prevailing parties. In *Hensley v. Eckerhart, supra*, we held that "the most critical factor" in determining a reasonable fee" is the degree of success obtained." *Id.* at 436. We specifically noted that prevailing at trial "may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved." Ibid.

473 U.S. at 11.

The plaintiffs in this case failed to present any evidence in support of their prayer for injunctive or declaratory relief. There

[1] "With respect to the amount of the award, I am governed by the Tenth Circuit opinion [*Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983)] . . . I also agree with it . . . It is not really so much how much money a jury decides to give . . . to award . . . as it is a determination in the court of law by a jury as to who was right under the circumstances, and labeling in this case the conduct of the police, these two police officers as it relates to these two plaintiffs who did prevail at trial, that in this circumstance the police were wrong. That's important." (R., Vol. II, p. 8.)

was no evidence of any unconstitutional policy or custom against blacks. The plaintiffs' evidence totally failed to support their allegations that the City of Aurora, its Mayor and City Council and its police department conspired to deny blacks any constitutional rights, let alone the right to be free from assaults, batteries and false arrests allegedly practiced upon them. The district court granted the motion for directed verdict made by the City, the Mayor and the City Council at the close of the plaintiffs' case-in-chief because there was *no* evidence to support any of the plaintiffs' civil rights allegations lodged against those defendants. Those allegations were in fact groundless and frivolous. The *only relief* the plaintiffs could have obtained based upon their evidence was damages, and then only against the individual police officers.

If in fact the jury had believed the testimony of the plaintiffs to the effect that they had been assaulted, beaten, bruised, subjected to outrageous conduct and false arrest by the police officers, certainly a substantial award of monetary damages would have been made. The jury was not confronted with the problem of fixing a damage award for deprivation of the plaintiffs' rights of free speech or due process. Had the jury believed that these plaintiffs had been assaulted, beaten, bruised and falsely arrested by the police officers the injury was readily ascertainable in money damages just as awards are made in common law tort actions. The $1.00 nominal damage award tells us only that the two police officers did something improper but insignificant in terms of the allegations lodged.

The attorney fee award in this case is 6,225 times greater than the nominal damages awarded the two plaintiffs. If there were significant constitutional principles at stake in this case requiring monetary vindication, obviously the plaintiffs failed to so impress the jury. Nothing in this record indicates what "important civil and constitutional rights that cannot be valued in monetary terms," *City of Riverside v. Rivera*, 477 U.S. 561 (1986), were involved here. Furthermore, neither the district court nor the

majority opinion have identified any important civil and constitutional rights vindicated by the $1.00 nominal damage awards in this case. Why? Because to do so necessarily means that the evidence must support the allegations that the police officers assaulted, beat, bruised and falsely arrested the plaintiffs. The $1.00 nominal damage award tells us in clear sounding language that the jury did not so find.

The *City of Riverside v. Rivera* case, unlike the case at bar, clearly served the "public interest." There, a large group of police officers entered a residence where a party was going on and, without arrest or search warrants, arrested the plaintiffs, who were Mexican Americans. Suit was brought under 42 U.S.C. § 1983 for damages, and for declaratory and injunctive relief to prevent further "discriminatory harassment against Mexican Americans." The jury returned 37 individual verdicts against the City and five police officers. The plaintiffs did not pursue their request for injunctive and declaratory relief, but the district court made it clear that had the plaintiffs asked for it, such relief would have been granted. The court entered judgment in the amount of $33,350 representing compensatory and punitive damages. Thereafter, the court awarded plaintiffs' attorneys fees in amount of $245,456.25. In upholding this award, the Supreme Court held that a § 1988 attorney fee award need not be proportionate to the damages awarded, although "results obtained" are a *critical factor.* In this regard, the court emphasized that the "public interest" had been served in preventing further discriminatory harassment of Mexican Americans. The district court found that the police officers' acts were motivated by a general hostility to the Chicano community and that the lawsuit was necessary to stop the unlawful institutional behavior involved in the case. In sharp contrast, no public interest has been identified by the district court or by the majority opinion in the case at bar. Significantly, in *City of Riverside,* Justice Powell, concurring, observed that where the suit is for private damages, the court must be guided by the success achieved.

I do not contend that there must be a yardstick guiding the district court in the allowance of attorney fees under § 1988. Here, however, the district court refused to consider the "success achieved" factor in this suit for damages even though the plaintiffs had won only nominal damages.[2] This was clearly wrong. The trial court erroneously relied upon the following *dictum* in *Ramos v. Lamm*, 713 F.2d 546, 557 (10th Cir. 1983):

> Some courts have reduced fees when the thrust of the suit was for monetary recovery and the recovery was small compared to the fees counsel would have received if compensated at a normal rate for hours reasonably expended. We reject this practice.

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[2]Most circuits agree that in a case where a constitutional violation is specifically identified (unlike the instant case) and a party is awarded nominal damages, such a party is in fact a prevailing party for attorney fee award purposes. *Ganey v. Edwards*, 759 F.2d 337 (4th Cir. 1985) (Failure to award any actual or nominal damages did not prevent prisoner, who had been denied meaningful access to the courts, from being the "prevailing party" entitled to costs and attorney fees); *Fast v. School Dist.*, 712 F.2d 379 (8th Cir. 1983), rehearing *en banc*, 728 F.2d 1030 (1984) (Discharged teacher awarded $1.00 in nominal damages for specific showing of deprivation of property without due process of law in a class action is a "prevailing party" under 42 U.S.C. § 1988); *Skoda v. Fontani*, 646 F.2d 1193 (7th Cir. 1981) (Plaintiffs who won jury verdict of $1.00 in a 42 U.S.C. § 1983 action were "prevailing parties" entitled to awards under § 1988 where court makes a positive finding of a violation of civil rights); *Huntley v. Community Sch. Bd. of Brooklyn*, 579 F.2d 738 (2nd Cir. 1978) (In civil rights action in which plaintiff recovered nominal damages of $100.00 for denial of procedural due process while conceding that termination of his employment was justified, there was no abuse of discretion in concluding that plaintiff at most won a "moral victory" of insufficient magnitude to warrant an award of attorney fees under 42 U.S.C. § 1988); and *Burt v. Abel*, 585 F.2d 613 (4th Cir. 1978) (The fact that plaintiff, a teacher discharged without notice or hearing constituting denial of procedural due process, may prevail on the merits yet recover only nominal damages shall in no way diminish his eligibility for attorney's fees under § 1988, though it is one of the factors properly to be considered on the amount of such award.)

The dictum in *Ramos v. Lamm*, which was the cornerstone of Judge McKay's dissenting opinion in *Nephew v. City of Aurora*, 766 F.2d 1464, clearly conflicts with express language in *Hensley v. Eckerhart* and *City of Riverside v. Rivera*. Significantly, Judge McKay does not cite to *Ramos v. Lamm* in his opinion for the *en banc* court, even though it was the basis for his dissent from the original panel opinion in this case and even though the district court stated that it was guided and governed by *Ramos v. Lamm*. (R., Vol. II, pp. 2, 8, 9.)

This case should be remanded to the district court as directed by a panel of this court in *Nephew v. City of Aurora, supra*, where we said:

> By this holding we do not imply that an award of nominal damages necessarily means that a corresponding fee award must also be nominal. However, where, as here, a plaintiff seeks substantial damages but wins only nominal damages, the award must be reduced to account for the plaintiffs' very limited success.[3]

766 F.2d at 1467.